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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-

IDA ALBARADO, HELEN B. H. CHU, HENRY J. CHU, CHEE KUNG FUI SOCIETY, LAPAZ FRANCISCO, MARCELLINO FRANCISCO, ALBERT K. KAAILAU, LINDA P. KAIAKAPU, ANN N. KALI, HARRIET U. KANO, JUNICHI KANO, KIYOSHI KIMATA, ARNOLD W. F. LEONG, KATHERINE A. LEONG, LO SUN D. LEONG, TAI HING LEONG, HANAYO T. NAUMU, WALLACE A. NAUMU, HIDEO NONAKA, HIROMI NONAKA, IWAO NONAKA, KAZUO NONAKA, MASATOSHI NONAKA, SHIGEKICHI NONAKA, TAKANO NONAKA and TAKAO NONAKA, *Petitioners,*

v.

STATE OF HAWAII, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

Petitioners IDA ALBARADO, HELEN B. H. CHU, HENRY J. CHU, CHEE KUNG FUI SOCIETY, LAPAZ FRANCISCO, MARCELLINO FRANCISCO, ALBERT K. KAAILAU, LINDA P. KAIAKAPU, ANN N. KALI, HARRIET U. KANO, JUNICHI KANO, KIYOSHI KIMATA, ARNOLD W. F. LEONG, KATHERINE A. LEONG, LO SUN D. LEONG, TAI HING LEONG, HANAYO T. NAUMU, WALLACE A. NAUMU, HIDEO NONAKA, HIROMI NONAKA, IWAO NONAKA, KAZUO NONAKA, MASATOSHI NONAKA, SHIGEKICHI NONAKA, TAKANO NONAKA and TAKAO NONAKA, herein sometimes called collectively the "Small Owners", pray

that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Hawaii entered in this cause on December 28, 1973.

OPINIONS BELOW

The initial opinion of the Hawaii Supreme Court ("the court below") is reported, with dissenting opinion, at 54 Haw. 174 (1973), App. p. 66. That court's opinion on rehearing, with two dissenting opinions, dated December 20, 1973, is reported at 55 Haw. 260 (1973), App. p. 114. The Hawaii Fifth Circuit Court ("the trial court") Decision, is not reported. Copies of the opinions, the Decision of the trial court and of the Judgment of the Hawaii Supreme Court are included in a Joint Appendix separately presented on behalf of Petitioners herein, McBryde Sugar Company, Limited, Olokele Sugar Company, Limited, and Selwyn A. Robinson, et al., all of whom seek review of the same judgment.

JURISDICTION

The original decision of the court below was filed on January 10, 1973 and, before the entry of judgment thereon, a timely Petition for Rehearing was filed on May 18, 1973 by Petitioners. An order filed June 18, 1973 allowed partial rehearing. The opinion on rehearing was filed December 20, 1973, and judgment was entered on December 28, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the court below, by its decision, which held, based upon a construction and application of Hawaii Rev. Stat. § 7-1, that all water in streams is property of the State, subject to riparian and appurtenant rights, and that appurtenant waters may no

longer be transferred away from the taro lands to which they were originally appurtenant for use elsewhere, effected a taking on behalf of the State of Hawaii of Petitioners' property without just compensation, in violation of the Due Process Clause of the Fourteenth Amendment.

2. Whether the court below, by deciding the issue of transferability of appurtenant water rights, not raised on appeal by any of the parties, without prior notice to Petitioners and without granting Petitioners a hearing, has so far departed from the usual course of judicial proceedings as to constitute a denial of Petitioners' right to a hearing and a taking of property in violation of the Due Process Clause of the Fourteenth Amendment.

3. Whether the rules of federal law applicable to protect vested water rights enunciated in the provisions of 43 U.S.C. § 661 give federal protection to the Petitioners as the possessors and owners of vested rights in water under recognized customs, laws and decisions of courts.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

43 U.S.C. § 661 provides:

> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manu-

facturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; . . ."

Hawaii Rev. Stat. § 7-1 (derived from Act of August 6, 1850, Sec. 7) provides, in full:

> **"Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water and roads shall be free to all, on all lands granted in fee simple; provided, that this shall not be applicable to wells and watercourses, which individuals have made for their own use."

STATEMENT OF THE CASE

Petitioners are owners of land in Hanapepe Valley, Island of Kauai, Hawaii, having appurtenant water rights.[1] Under recognized Hawaiian law, those water rights include the right to sever or transfer ownership away from the land to which the water was

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[1] "Appurtenant" water rights are those which follow from the fact that just prior to the first passage of title to the lands from the King of Hawaii into private ownership, water was being used thereon. Territory v. Gay, 31 Haw. 376, 383 (1930). These water rights are usually those associated with lands used by the ancient Hawaiians for taro culture and passed with the conveyance of the lands without specific mention as an easement appurtenant. Peck v. Bailey, 8 Haw. 658, 661 (1867).

originally appurtenant and the right to divert and use the water on other lands.[2] Almost the entire value of appurtenant water rights inheres in this right of transferability.[3]

Petitioners were joined as defendants in the present suit instituted in 1959 by McBryde Sugar Company, Limited ("McBryde") pursuant to Part III, Chapter 664, Hawaii Rev. Stat., to adjudicate the ownership "in conformity with vested rights"[4] of all waters of the Hanapepe Valley not previously adjudicated in *Territory* v. *Gay,* 31 Haw. 376 (1930), affirmed, 52 F.2d 356 (CA 9th, 1931), certiorari denied, 284 U.S. 677 (1931).

The State of Hawaii never challenged Petitioners' rights to sever the ownership of their water rights from the land with which they originally passed as an appurtenance, or to transfer those waters for use on other lands, whether or not within the watershed of origin. The State itself claimed and was awarded

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[2] Peck v. Bailey, 8 Haw. 658 (1867); Lonoaea v. Wailuku Sugar Co., 9 Haw. 651 (1895); Horner v. Kumuliilii, 10 Haw. 174 (1895); Wong Leong v. Irwin, 10 Haw. 265 (1896); Palolo Land & Improvement Co. v. Wong Quai, 15 Haw. 554 (1903); In re Taxes, Waiahole Water Co., 21 Haw. 679 (1913); Foster v. Waiahole Water Co., 25 Haw. 726 (1921); Territory v. Gay, 31 Haw. 376 (1930).

[3] While the ancient Hawaiian subsistence economy was based upon taro production, with the advent of a modern society the value of water for taro production virtually disappeared, and appurtenant waters have retained value only because they are transferable away from taro patches in valley bottoms to dry lands on the plains above for use in the irrigation of sugar cane and other crops. The 50,050 gallons of water per acre per day awarded Petitioners by the trial court for each acre having appurtenant water rights is many times more water than is usable for any crop other than taro or rice in paddy culture. Sugar cane requires 10,000 gallons per acre per day or less.

[4] Hawaii Rev. Stat. § 664-34.

appurtenant water rights which had been severed from the land to which originally appurtenant.[5] The sole issues before the trial court affecting Petitioners were the determination of what lands had appurtenant water rights by virtue of ancient Hawaiian taro culture thereon and the amount of water to which each such acre was entitled.

Following a four-month trial in 1965, on December 10, 1968 the trial court entered its decision determining which of Petitioners' lands were entitled to appurtenant water rights and awarding to Petitioners 50,050 gallons of water per day for each acre so entitled. Petitioners, together with the other small owners of appurtenant water rights, were awarded a total of 1.4 million gallons per day. The trial court's decision also made major awards of appurtenant water out of the substantial flow of the nonnavigable Hanapepe stream[6] to the partners of Gay & Robinson (who lease some of their lands and waters to Olokele Sugar Company, Limited) and McBryde, the three sugar plantations involved in the litigation, each of which diverts its water from Hanapepe Valley for use on lands outside the watershed, and to the State of Hawaii, which leases part of its water to private persons for agricultural use, both within and without the valley, and diverts part through a county water works for munici-

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[5] Amended Judgment, Schedule B, Record Doc. No. 34.

[6] "Total water available is 32 million gallons per day or less ten per cent of the time. Total water available is 145 million gallons or more per day another ten per cent of the time. During the remaining eighty per cent of the time, the total water available is between 32 million and 145 million gallons per day." (Decision, Finding 9, App. p. 6.)

pal use on lands distant from those to which the waters diverted were originally appurtenant.[7]

The Amended Judgment awarded Petitioners absolute ownership of a definite quantity of water satisfactory to Petitioners. No appeal was filed by Petitioners.

Separate appeals to the Hawaii Supreme Court were filed by McBryde, Gay & Robinson and the State. The appeals of those parties were limited to questions concerning the amount of appurtenant, prescriptive and storm and freshet waters to which each of them was entitled. No appeal questioned the awards made to Petitioners or the transferability of water or the right of severance and sale of water rights apart from the land involved. No notice of the appeal of any party was served upon any of Petitioners.[8]

On January 10, 1973, with one Justice dissenting, the Hawaii Supreme Court entered an opinion holding, *inter alia,* that "the right to the use of water ac-

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[7] The trial court's decision includes awards of appurtenant water rights to certain of the small land owners, as well as to the State, McBryde and Gay & Robinson for water rights severed and reserved when the land was conveyed away at some time prior to the trial. (See Amended Judgment, Schedules A, B, C and D, Record Doc. No. 34.) These awards of appurtenant water rights were affirmed by the Hawaii Supreme Court, yet, since those parties no longer own the lands to which the reserved water rights were originally appurtenant, the lower court's decision prohibiting use thereof except on the lands to which originally appurtenant means that those water rights cannot be used by their owners at all.

[8] The lower court's own rules (Hawaii Rules Civ. Proc., Rules 73(b) and 5(a)) and decisions would have required notice to Petitioners if anything involved in the appeal was to affect them. Kealoha v. Halawa Plantation, 24 Haw. 436 (1918); Madden v. Madden, 44 Haw. 442 (1960). Obviously, neither the State nor any other party to the appeal believed the appeal in any way affected Petitioners.

quired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant and any contrary indications in our case law are overruled", thus making such water rights, for the first time, and contrary to a more than a century of judicial precedent and private and governmental recognition, nonseparable, nontransferable and useful only on the taro land on which the water was being used when that land first came into allodial ownership during the reign of Kamehameha III.[9] The lower court makes no attempt to base this revolutionary decision on any prior State precedent, relying solely on Hawaii Rev. Stat. § 7-1,[10] and a dictionary definition of the word "appurtenant".[11]

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[9] 54 Haw. at 191, App. p. 83.

[10] As stated by Justice Levinson in his dissenting opinion on rehearing (55 Haw. at 284, App. p. 138):

> "The court's reasoning was bottomed wholly on section 7 of the Enactment of Further Principles, originally published as L.1850, § 7, at 202, and presently compiled in HRS § 7-1 which, in its English version, guarantees to the 'people . . . a right to drinking water [and] running water,' and also declares that '[t]he springs of water [and] running water shall be free to all, on all lands granted in fee simple.' Based on this guage, and the historical generalization that 'the missionaries, many of whom came from Massachusetts, not only brought the Christian religion to the Hawaiian people, but also brought with them the English common law as recognized in Massachusetts,' 54 Haw. at 193, 504 P.2d at 1342 [App. p. 85], the court concluded that privately owned water may only be used in connection with the land to which it is appurtenant and may not transported to kula [dry] land elsewhere. . . ." (footnote omitted).

[11] 54 Haw. at 190, App. p. 82. This reliance is particularly anomalous in that the water rights concerned were conceived of as and called "prescriptive rights" in early Hawaiian cases, only later being denominated "appurtenant rights" in order to distinguish them from rights acquired by adverse user. Territory v. Gay, 31 Haw. 376, 383-4 (1930).

By the court's decision, Petitioners are prevented from continuing their long-established practice of using waters appurtenant to some of their lands upon other lands not having such water rights. Petitioners are further deprived of the right to sell their water rights to others (usually one of the three sugar plantations, each of which plantations has use for the water only outside the valley).[12] Those who own appurtenant water rights already severed from the land to which originally appurtenant cannot, under the lower court's decision, use them anywhere at all and are thus deprived of their entire value.

By proscribing the transferability and severability of all appurtenant waters in the State, the court expropriated for the State, by bringing into the public domain, the very waters that had been for almost a century used in irrigation by private owners of lands having appurtenant rights on other lands both within and outside the watershed of origin.[13] This radical

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[12] This loss is substantial. As was called to the lower court's attention at the oral argument on rehearing, the long-recognized rule of thumb for such sales in Hanapepe Valley was one acre of water rights for one acre of dry land. Thus, by exchanging their water rights for dry land, Petitioners could double their landholdings if they desired to cease agricultural activity, or, by so exchanging a portion of their water rights, could increase their arable land for crops requiring less water than taro.

[13] For example, Petitioner Hideo Nonaka's ten-acre irrigated truck garden contains only four acres having water rights. By the lower court's decision, he can no longer grow vegetables requiring irrigation on the six acres not having water rights, and, since he is also effectively prohibited from selling his "nontransferable" water to anyone else, he has lost not only the value of the unused water as property, but also has been deprived of the economic value of his other six acres of dry land for irrigated agricultural

and unpredictable change in property rights was made on the basis of a record directed to other issues, a record that includes no reference to transferability of water nor any evidence relating to, nor any claim of, nontransferability of such waters, either by the State or any other party. The lower court's decision on these matters has not been the subject of any evidentiary hearing or other proceeding permitting Petitioners to defend their rights or to claim just compensation for the taking of their property.

On first learning of the decision of January 10, 1973 [14] (no formal notice having been given to Petitioners), Petitioners filed a Petition for Rehearing, and, thereafter, a further brief, following the lower court's order permitting additional briefing. In their petition and brief, Petitioners asserted that the construction and application of Hawaii Rev. Stat. § 7-1 to prohibit the sale or transfer of appurtenant rights would constitute a taking of vested rights without

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use. The so-called riparian rights newly created by the lower court are no substitute. First, almost all the land in Hanapepe having appurtenant rights is neither located on nor capable of being watered directly from the stream, such lands being watered from ancient level ditches bringing water from a removal point far upstream. Second, the riparian rights created require return to the stream undiminished. Hawaiian water rights have always been consumptive rights—rights to the use of water without necessity of return to the stream.

[14] The lower court also violated State statutes by its decision—Hawaii Rev. Stat. § 602-5 limits the lower court's jurisdiction to questions properly brought before it on appeal; Hawaii Rev. Stat. § 602-13 (in effect at the time of the decision) prohibited the lower court from deciding a case on any point material to the decision thereof not raised or argued by counsel on either side without first allowing argument of counsel on that point.

compensation and without due process of law;[15] that the decision of the court constituted a taking of vested property rights without compensation, contrary to the Due Process Clause of the Fourteenth Amendment;[16] that the decision deprived Petitioners of their constitutional right to a hearing pursuant to the Due Process

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[15] Brief Per Order of June 18, 1973, on Behalf of Ida Albarado, et al. (hereinafter cited "Brief of Albarado"), Record Doc. No. 70, pp. 21-22: "The seventh section of the Act of August 6, 1850, as amended [Hawaii Rev. Stat. § 7-1], was not intended to be other than declaratory of certain reserved rights of the former tenants of particular lands, when their former landlords took allodial titles, ... To hold otherwise would be to take away valuable vested rights without compensation and without due process of law, ..."

[16] Petition for Rehearing . . . of Ida Albarado, et al. (hereinafter cited "Petition for Rehearing of Albarado), Record Doc. No. 61, p. x: The decision deprives [Petitioners] of their vested rights to property . . . in violation of the United States and State Constitutions . . ."; p. 6: "It is, therefore, the contention of the Small Owners that the decision of this Honorable Court as it relates to depriving the Small Owners of the right to sever and transfer their waters to any source they want, whether or not within the watershed of origin, is a taking of property without due process, . . ."; p. 8: "By limiting the place of use of the Small Owners' waters, once the Small Owners put such lands to a use other than agricultural, the value of those waters is entirely destroyed. No such taking or damage is constitutionally permissible without a hearing and without compensation."; pp. 8-9: ". . . [T]he taking of the Small Owners' valuable right to transport their waters to other lands, either in or out of the Hanapepe watershed, by severing such waters from the land involved, a vested right long recognized in this jurisdiction, is a taking in violation of those [Fourteenth Amendment] provisions. See *Saunders* v. *Shaw*, 244 U.S. 317 (1917), *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930) . . ."; Brief of Albarado, Record Doc. No. 70, p. 2: "The rights of the Small Owners are vested rights which cannot constitutionally be divested without full payment for any such taking."

Clause of the Fourteenth Amendment;[17] and on the further ground that such decision was in violation of rules of federal law enunciated in 43 U.S.C. § 661, applicable to protect Petitioners' vested property rights in water.[18]

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[17] Petition for Rehearing of Albarado, Record Doc. No. 61, p. viii: ". . . [T]he Small Owners and other owners of ancient appurtenant water rights in Hanapepe Valley have freely bought and sold their water rights and caused them to be transferred to other lands in Hanapepe Valley or transferred to one of the three plantation companies using water from the Valley, which thereupon diverted the water from the Valley to lands outside the Valley, most of which are in another watershed. By the decision of the Court entered on January 10, 1973, this valuable property right has been taken away from the Small Owners, without any opportunity for them (or any other party) to be heard on such point, . . ."; p. 2: ". . . [T]he decision of this Court holding, without any opportunity for hearing by the Small Owners on the issue . . . contravenes not only [Hawaii Rev. Stat.] Section 602-5 but also, of course, the constitutional limitations of the United States and State Constitutions prohibiting the taking of property without due process of law . . ."; p. 3: "Such a due process hearing is not only required by Section 602-13, Hawaii Revised Statutes, but is also required by the rules of both procedural and substantive due process under the United States and State Constitutions . . ."; pp. 8-9: "Probably the most fundamental procedural requirement of the United State Constitution, particularly the Fourteenth Amendment of the United State Constitution, . . . is that an opportunity for a hearing be had before deprivation of property by any state. . . . As recently as February of this year, this Court in *In re Castle* [54 Haw. 276, 506 P.2d 1 (1973)] has rigorously defended the due process guarantee. (Though in that case the Court's rigorous defense of such right was in favor of the State, we trust that no lesser rule should apply to due process for individuals.)"

[18] Petition for Rehearing of Albarado, Record Doc. No. 61, p. 7: "Not only are normal protections of the Constitution of the United States applicable to the rights of the Small Owners sought to be destroyed by the Court herein, but also the provisions of the Treaty of Annexation between the Republic of Hawaii and the United States of 1897, the Act of Congress to provide a Government for the Territory of Hawaii of April 30, 1900 (31 Stat. 141),

Petitioners' Petition for Rehearing raised the foregoing federal constitutional issues, and the other federal issues, at the earliest opportunity,[19] but such issues were not allowed to be argued before[20] and were not determined by the Hawaii Supreme Court, and should be considered here.

REASONS FOR GRANTING THE WRIT

The right of transferability of water, from wet places where it is of little significance in a modern society to arable lands where it can be used for the irrigation of sugar or other crops, or for industry or

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and the Admission Act of 1959, when read together with 43 U.S.C. § 661 and the interpretations of that section by the Supreme Court of the United States, make clear that the vested rights and customs long recognized in Hawaii at the time of its annexation by the United States are recognized by Federal law, and the decision of this Court contravening such Federal statutes raises a substantial Federal question."

[19] Levinson, J., on rehearing, dissenting, 55 Haw. 297-298, App. pp. 151-152: "In view of the wholly unexpected nature of the court's holdings in *McBryde I*, the parties of course could not have been expected to raise their constitutional claims as part of their appeals from the decision of the trial court. Since the parties asserted constitutional grounds for the reversal of *McBryde I* at the first possible instance—in their petitions for rehearing—their arguments in this respect are properly before the court, *cf. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1930), and therefore I consider myself bound to discuss them here."

[20] The Order of June 18, 1973, App. p. 108, calling for further briefing did not include the federal constitutional and other federal issues raised by the petitions of the parties for rehearing. Oral argument on rehearing was restricted to the two issues as to which further briefing was required by that Order. (No record reference is possible due to the lower court's Order Denying Motion, App. p. 113, denying the Motion to Have Official Reporter Present at Oral Argument, App. p. 111.)

municipal purposes, has been the key to the transformation of Hawaii's economy from a monarchy based upon subsistence farming to a modern society with highly mechanized agricultural operations on vast areas of formerly arid land irrigated with water transported from very wet valleys as much as thirty miles removed from the agricultural areas.[21] The right to transfer water away from the taro land sources to which originally appurtenant to other lands is necessary to continuation of irrigated agriculture in Hawaii.

The lower court's decision, made by a bare majority of that court,[22] decided matters not brought before that court on appeal,[23] in the face of the serious federal constitutional questions relating to that decision raised in the petitions for rehearing of Petitioners and other parties below, as to which issues the lower court would allow no oral argument, in the face of the vigorous dissenting opinions of Justices Marumoto and Levinson,[24] and involving "a retroactive alteration of state law such as would constitute an unconstitutional taking of private property",[25] without any consideration by the majority of the lower court of the federal constitu-

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[21] See Appendix 1 of Record Doc. No. 65.

[22] Chief Justice Richardson, Justice Abe (now retired), and Circuit Judge Ogata (appointed by the Chief Justice to sit on this case in the place of Justice Kobayashi, disqualified).

[23] Rule 3 of the Rules of Supreme Court of Hawaii requires each appellant to state the questions presented for decision, and the points of alleged error relied on. The changes in the water law of Hawaii announced by the court were not presented for decision by any party, and were not included in the points of alleged error before the court.

[24] Which in themselves illuminate the seriousness of the federal questions involved. See Louisville & Nashville R. Co. v. Melton, 218 U.S. 36, 49 (1910).

[25] Stewart, J., dissenting, Bonelli Cattle Co. v. Arizona, — U.S. —, 38 L.Ed.2d 526, 545 (1973).

tional issues raised, calls for this Court's exercise of its power of review. The issues involved vitally affect the economy of Hawaii [26] and will have substantial effect on the nation as a whole.[27] The lower court's decision was made in a way which has been demonstrated not to be in accord with the decisions of this Court [28] and in a manner which has so far departed from the accepted and usual course of judicial proceedings on issues raising questions of federal constitutional law as to deprive Petitioners of the fair hearing that procedural due process demands and to justify exercise by this Court of its power of review.[29]

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[26] Hawaii's 1972 crop of sugar alone created over $200,000,000 in income. Sugar is cultivated on 232,000 acres of land in Hawaii, of which about one-half, producing two-third the sugar crop, is irrigated. Over 10,000 year-around employees in the sugar industry have a pay roll of over $80,000,000 annually. Sugar Manual 1973, Hawaiian Sugar Planters' Association, pp. 3-4. Affidavit of Cushing, Record Doc. No. 56. Hawaii's pineapple crop generated $140,000,000 with 7200 employees and other diversified agriculture in Hawaii generated $80,000,000 with 7200 employees in 1972. First Hawaiian Bank, Hawaii in 1973, pp. 10, 13, 44 (1973).

[27] Hawaii produces nearly 10% of the nation's sugar consumption, and approximately 18% of domestic production. U.S. Dept. of Agriculture, Sugar Report No. 260, p. 16 (1974).

[28] See Levinson, J., dissenting, 55 Haw. at 297-303, App. pp. 151-157.

[29] "The due process clause of the fourteenth amendment to the Federal Constitution and article I, sections 4 and 18 of the State Constitution forbid the State from taking private property without just compensation. This prohibition speaks to all instrumentalities of state government equally, restraining the courts from engineering unconstitutional takings no less than the legislature. *See Chicago, Burlington & Quincy R. R.* v. *Chicago*, 166 U.S. 226, 241 (1897). *See generally Shelley* v. *Kraemer*, 334 U.S. 1, 14-15 (1948), and cases cited therein." Levinson, J., dissenting, 55 Haw. at 298, App. p. 152.

"For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by

Further, if the bold and "revolutionary" taking "engineered" [30] by the highest court of Hawaii to turn over to the State of Hawaii water rights always theretofore recognized as privately owned be allowed to stand unreversed, the courts of this and other states will be encouraged to expropriate private property of other owners without compensation by the means used in this case by the court below—a judicial declaration that the privately owned rights never existed—rather than by eminent domain.

While the foregoing language in any other case might appear to be too strong, in this case:

1. The lower court has decided issues adversely affecting Petitioners that were not raised in the trial court, or on appeal, without prior claim or notice by the State and without hearing or argument on a record related to such issues.

2. The lower court deprived Petitioners of due process by denying them the opportunity to show that the State of Hawaii was bound by equitable estoppel to respect Petitioners' rights to continued severability and transferability of their water rights, in reliance on which Petitioners and others have invested moneys

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the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court." Stewart, J., concurring, Hughes v. Washington, 389 U.S. 290, 296-7 (1967).

"If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction." Brandeis, J., Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 679 (1930).

[30] Both characterizations are those of Justice Levinson.

and ordered their existence. That the State can be so bound is well established under State law.[31]

3. The lower court has divested vested property rights[32] by a sudden, unexpected decision, entirely unpredictable in light of the long-established judicial precedent relating to property rights in water in Hawaii,[33] which judicial precedent has been given legislative sanction[34] and governmental recognition.[35]

4. The lower court has failed to consider the question of whether water rights recognized by Hawaiian custom, laws and the decisions of Hawaii courts are protected by federal law embodied in 43 U.S.C. § 661.[36]

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[31] Yamada v. Natural Disaster Claims Commission, 54 Haw. 621, 513 P.2d 1001 (1973); Waianae Model Neighborhood Area Association, Inc. v. City & County of Honolulu, 55 Haw. 40, 514 P.2d 861 (1973); In re Title of Kioloku, 25 Haw. 357 (1920); and see Jover v. Insular Government, 221 U.S. 623, 633 (1911).

[32] The rights of property in water involved here have become "rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves" (Helvering v. Hallock, 309 U.S. 106, 119 (1940)), the deprivation of which cannot be had without compliance with due process requirements. See Marumoto, J., dissenting, 54 Haw. at 207-208, App. pp. 99-100.

[33] Some of the prior Hawaiian precedent establishing the right of transferability is discussed in Justice Levinson's dissent, 55 Haw. 294-297, App. pp. 148-151.

[34] As a result of a legislative commission set up in 1915 to analyze Hawaii underground and surface waters and to recommend necessary legislation, if any. See the analysis thereof by Levinson, J., dissenting, 55 Haw. at 275-277, App. pp. 129-131.

[35] See 55 Haw. at 277-280, App. pp. 131-134.

[36] While the provisions of 43 U.S.C. § 661 were not directly made applicable to Hawaii at the time of annexation, since both the Joint Resolution of Congress of 1898 (Public Resolution No. 51, 55th Congress, 2nd Session) and the Organic Act (Act of April 30,

If the appurtenant rights of the Petitioners, which resulted from long user, are protected by the statute, it is clear that the federal protection also extends to transportability onto other lands.[37]

The decision of the lower court has thus, retroactively, taken for the State Petitioners' property rights without a hearing. The property rights taken are obviously of great value, and the decision will affect adversely many people whose situation is the same as the Petitioners, as well as the sugar industry of Hawaii on which the nation substantially depends. The decision expropriates property rights without compensation and contrary to the Due Process Clause of the Fourteenth Amendment. The question of the constitutional propriety of the taking is substantial. The Petitioners raised the constitutional and other federal questions at the earliest opportunity. For all the reasons given and because Petitioners will have no other recourse, this Court should exercise its power of review.

1900, 31 Stat. 141) excepted Hawaii from the existing public land laws of the United States, as was declared in Broder v. Natoma Water & Mining Co., 101 U.S. 274 (1879), the provisions of 43 U.S.C. § 661 were "rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continuing use, than the establishment of a new one". Thus, the Court held, it was the vesting of the rights that gave rise to the later statutory protection under 43 U.S.C. § 661, *a fortiori* the application of the statute is not necessary to the vesting itself. As a result, rights to the severance and transfer of water from the lands to which originally appurtenant, which vested and accrued by the local customs, laws and the decisions of courts of Hawaii, may be entitled to federal protection as an independent matter of federal law.

[37] Hunter v. United States, 388 F.2d 148 (CA 9th, 1967).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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